

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

F. T. KREPS & SONS
DRYWALL, INC.

Employer

and

OPERATIVE PLASTERERS & CEMENT
MASONS INTERNATIONAL
ASSOCIATION, PLASTERERS LOCAL NO. 80

Petitioner

and

BRICKLAYERS AND ALLIED
CRAFTSMEN, LOCAL 16

Intervenor

Case No. 8-RC-16342

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.¹

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.²

The Petitioner, Plasterers Local 80, seeks a unit of plasterers employed by the Employer in Ashtabula, Cuyahoga, Geauga, Lake and Lorain Counties in Ohio, but indicated it would proceed to an election in a unit without geographic restrictions. The Intervenor, BAC Local 16, asserts that the petition should be dismissed either because (1) the Employer has performed no

¹ Operative Plasterers & Cement Masons International Association, Locals 31, 39, 109 and 179 did not appear at hearing. On March 29, 2002 these locals were advised by facsimile of an opportunity to intervene in this proceeding by the close of business on April 3, 2002. None of these unions availed themselves of that opportunity.

² The Petitioner and Intervenor filed post-hearing briefs that have been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claim to represent certain employees of the Employer.

work in any of these counties in over two years or (2) due to the existence of Section 9(a) contracts covering employees in any unit that could be found appropriate. The Employer takes no position on the composition of the unit.

I find there are no employees in the petitioned-for unit and therefore no unit is appropriate. An election in any larger unit is barred by the existence of other Section 9(a) agreements. Accordingly, I dismiss the petition.

The Employer, based in Youngstown, Ohio, works as an interior contractor performing plaster, drywall and carpentry work. It performs the vast majority of its plastering work in the Youngstown, Ohio and Sharon, Pennsylvania areas. It acknowledges that it has not performed any work in Cuyahoga, Lorain, Lake, Ashtabula, and Geauga Counties in over two years. Specifically, it last worked in Ashtabula County over four years ago and has never performed work in Geauga County. It is reasonable to assume the Employer has never worked in Lorain County, since it has a self-imposed limit of not working more two hours away from its Youngstown facility.³ The Employer has performed only two jobs in Cuyahoga and Lake County which occurred in 1999.⁴

The record evidence establishes that the Employer uses a core group of plasterers, several of whom travel to each of its jobs regardless of location. These individuals are from the Youngstown and Sharon areas and are members of Locals 31, 39 and 179, the Plasterers local unions in that area. The record does not reveal when the Employer last employed a plasterer who was a member of, or who was referred to it by, the Intervenor. It is clear that this has not occurred for at least two years.

³ The question is not addressed directly in this record.

⁴ The Employer testified that it never worked in Cuyahoga and Lake County. However, it mentioned two 1999 jobs, one in Solon (Cuyahoga County) and Paintsville (sic). Since there is no such city or village in Ohio, I can only conclude that the Employer meant Painesville, located in Lake County. The fact that the Employer testified this job fell within the geographic jurisdiction of the Intervenor, which includes Lake County, lends even further support to this conclusion.

The Employer is bound to several multi-employer contracts with various Plasterers locals, including Local 179 (Youngstown), Local 109 (Akron), Local 31 (Pittsburgh, PA) and Local 39 (Wheeling, W.Va.). None of these agreements, by their terms, are applicable in the five counties at issue. The Employer is also currently party to an agreement with the Intervenor, purporting to cover both bricklaying and cement mason work performed in Ashtabula, Lake and Geauga Counties.⁵ It has no contract with the Petitioner.

Number of Employees in the Petitioned-For Unit

The Board has long held that it will not certify a representative for bargaining purposes in a unit consisting of less than two employees. **Roman Catholic Orphan Asylum**, 229 NLRB 251 (1977), **Somona-Marin Publishing Co.**, 172 NLRB 625 (1968). Because it will not certify units with less than two employees, the Board also will not direct elections in such units. **Teamsters Local 115 (Vila-Barr Co.)**, 157 NLRB 588 (1966), **Ray Black & Sons Construction, Inc.**, 335 NLRB No. 38 (2001).

When dealing with a construction employer, like this one, the determination of employee voting eligibility is made according to the standards set forth in **Daniel Construction Co.**, 133 NLRB 264 (1961) and **Steiny & Co.**, 308 NLRB 1323 (1992). This formula is based upon employees performing unit work a specified number of days in either the one or two year periods preceding the voting eligibility date. The record in this matter clearly establishes that the Employer has performed no plastering work within this five county area for over two years. As no employees have performed work within the petitioned-for unit in over two years, there can be no employees in the unit. There is nothing in the record to indicate that this is an unusual period in the Employer's business history. In fact, the infrequency with which Employer performs works in these counties indicates that it would be impossible to predict when it might ever have

⁵ I am satisfied that the Local 179 and Intervenor agreements meet the criteria for Section 9(a) contracts set out in **Staughton Fuel & Material, Inc.**, 335 NLRB No. 59 (2001). Based on this latter agreement, I find that the hearing

employees working in these counties that meet the Steiny/Daniels formula. As there are no unit employees, the petitioned-for unit is inappropriate and no election can be directed in it. Teamsters Local 115, supra.⁶

A Unit Without Geographic Boundaries

As noted above, the Petitioner has indicated a willingness to proceed to an election in a unit without geographic boundaries if the petitioned-for unit was found not to be appropriate. However, the Intervenor correctly notes that such a unit would include the counties, and employees, covered by the current Section 9(a) agreement between the Employer and Local 179. Accordingly, an election in such a unit, even if appropriate, is barred by the existence of this contract. Pontiac Ceiling & Partition Co., 337 NLRB No. 16 (2001), Verkler, Inc., 337 NLRB No. 18 (2001).⁷

ORDER

Accordingly, this petition is hereby dismissed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by April 22, 2002.

officer correctly granted BAC Local 16's motion to intervene in this matter.

⁶ I make no finding on whether the petitioned-for unit might be an appropriate if there had been the minimal number of employees required for the direction of election.

⁷ While this agreement is a 4-year contract, the petition was filed within the first three years of its term and it therefore serves as a bar. Union Carbide Corp., 190 NLRB 191 (1971).

Dated at Cleveland, Ohio this 8th day of April 2002.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

420-5021